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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 168

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION and WBBF, INC.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Federal Broadcasting System, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case which was on petitioner's appeal from an order of the Federal Communications Commission, dated 14 March 1958.

OPINIONS BELOW

The opinion of the Court of Appeals was unreported when this petition was prepared. It appears on page 25 of the Appendix to this petition. The Federal Communications Commission issued its opinion on 14 March 1958 (the same date as its above cited order) and its

text appears on pages 58-162 of the Record; see, also, Supp. J. App. 1-26.[1]

JURISDICTION

The judgment of the Court of Appeals was dated and entered 2 April 1959.

28 USC 1254(1) confers jurisdiction on this Court to review the judgment in question by writ of certiorari.

QUESTION PRESENTED FOR REVIEW

Although other questions were included among the propositions urged in the Court of Appeals, the primary question upon which the decision of this Court is sought is whether the Commission has correctly construed the term "originating station" as intended in 47 USC 325(a). This question may also be phrased thus: Whether the term "originating station" as employed in 28 USC 325(a) can be construed to include a slave or network affiliated station, that neither originates the program nor owns any interest therein? It is to be observed that under the Commission's regulations the slave station is empowered to refuse its consent to the rebroadcast of such programs and to thereby make rebroadcasting illegal even if the owner desires rebroadcasting.

It should be noted that neither the question nor the Commission suggest that the slave or affiliated station can

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[1] There are references herein to the Joint Appendix (J. App. ——) which was employed in the first rebroadcast case in the Court of Appeals; i.e., FEDERAL BROADCASTING SYSTEM, INC. v FEDERAL COMMUNICATIONS COMMISSION (1956) 97 US App DC 293, 231 F2d 246 (Appeal No. 12,494). Each reference to the "J. App." has a parallel citation to the Record in the Court of Appeals in that case.

This petition also refers to material appearing in the Supplemental Joint Appendix (Supp. J. App. ——) which was employed in the second rebroadcast case in the Court of Appeals, i.e., Appeal No. 14,418, the judgment from which this petition comes.

actually authorize a rebroadcast. All that the veto-invested slave station can do is to prevent rebroadcast of a program which belongs to others and in which it owns no interest—thus does the Commission invest the slave station with the sort of control that is usually inseverable from ownership. Under the Commission's regulations, at least two consents are necessary whereas the statute itself requires only "the express *authority* of *the* originating station."

A subsidiary question arises if the question in the preceding paragraph is answered in the affirmative, namely, whether a slave or affiliate station's refusal to consent to the rebroadcast of programs in which it owns no interest is contrary to the public interest, or otherwise demonstrates its unfitness as a broadcast licensee. The Commission itself has stated that an unreasonable refusal to consent to rebroadcast "may well constitute conduct going to the qualifications of a licensee to operate in the public interest." An answer to such an inquiry necessarily involves an evaluation of the criteria which the Commission employs in determining whether the refusal to grant rebroadcast consent is reasonable or not. The Commission has specified six such criteria, which the Court of Appeals declined to review.

STATUTES INVOLVED

The basic statute involved, originally enacted as Section 28 of the Radio Act of 1927, ch. 169, 44 Stat. 1162, now known as Section 325(a) of the Communications Act: 47 USC 325(a) reads as follows:—

"(a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, *nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express*

authority of the originating station." (Emphasis supplied)

Since the Commission says that in appraising the reasonableness of network station's refusal to consent to the rebroadcast of a program in which it owns no interest "whether the program [for the rebroadcast of which its consent is sought] has public service aspects that make its wide dissemination to the public clearly desirable", the following statute is pertinent:—

"47 USC 325 reads:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

REGULATION INVOLVED

Title 47, Sec. 3.121 of the Code of Federal Regulations (1958) provides in part here pertinent:—

"*Rebroadcast.* (a) The term 'rebroadcast' means reception by radio of the program of a radio station, and the simultaneous or subsequent retransmission of such program by a broadcast station.

"Note 1: As used in § 3.121, program includes any complete program or part thereof, or any signals if other than A-3 emission.

"Note 2: In case a program is transmitted from its point of origin to a broadcast station entirely by telephone facilities in which a section of such transmission is by radio, the broadcasting of this program is not considered a rebroadcast.

"(b) The licensee of a standard broadcast station may, without further authority of the Commission, rebroadcast the program of a United States standard or FM broadcast station, provided the Commission is notified of the call letters of each station rebroad-

cast and the licensee certifies that express authority has been received from the licensee of the station originating the program.

"Note: The notice and certification of consent shall be given within 3 days of any single rebroadcast, but in case of the regular practice of rebroadcasting certain programs of a standard broadcast station several times during a license period notice and certification of consent shall be given for the ensuing license period with the application for renewal of license, or at the beginning of such rebroadcast practice if begun during a license period.

"(c)(1) The licensee of the standard broadcast station located within a state or the District of Columbia, may, without further authority of the Commission rebroadcast on a noncommercial basis a noncommercial program of a United States international broadcast station.

• • • • •

"Note 1: The broadcasting of a program relayed by a remote pick-up broadcast station (§ 4.401 of this chapter) is not considered a rebroadcast.

"Note 2: Informal application may be employed.

"Note 3: By Order No. 82, dated and effective June 24, 1941, until further order of the Commission, § 3.121(d) is suspended only insofar as it requires prior written authority of the Commission for the rebroadcasting of programs originated for that express purpose by United States Government radio stations.

"(e) In case of a program rebroadcast by several standard broadcast stations, such as a chain rebroadcast, the person legally responsible for distributing the program or the network facilities may obtain the necessary authorization for the entire rebroadcast both from the Commission and from the person or licensee of the station originating the program."

• • • •

STATEMENT OF THE CASE

Petitioner is the licensee of WSAY, an amplitude modulation broadcasting station in Rochester, New York. The respondent WBBF, Inc., is the corporate licensee of another amplitude modulation broadcasting station in Rochester, now known as Station WBBF, formerly known as WARC.

From time to time during the period July 1952 to January 10, 1953,[2] petitioner asked WBBF for its consent to rebroadcast programs carried by WBBF (then known as WARC):—

> "* * * when the facilities of [WBBF] are hired or purchased, either directly by a sponsor, or sponsors, or their agencies, or indirectly through the facilities of a network, and when this signal * * * is broadcasting the program or programs of a sponsor or sponsors, which desire, or may desire, their programs rebroadcast by radio station WSAY; it being expressly understood that Station [WBBF] does not

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[2] The reason petitioner's request of WBBF antedates the judgment of the Court of Appeals by so great a period of time is that the judgment from which this petition comes was the second judgment of the Court of Appeals on questions which included the one here presented. The first rebroadcast decision FEDERAL BROADCASTING SYSTEM, INC. v FEDERAL COMMUNICATIONS COMMISSION (1956) 97 US App DC, 293, 231 F2d 246, as did the proceeding here appealed from, involved an attack on respondent's right to refuse to consent to a rebroadcast of programs in which it owned no interest and, thereby, to preclude petitioner's right to rebroadcast (after obtaining consent from the owner of such material) any of the programs on which such dead-hand consent was withheld. The first appeal was occasioned because the Commission refused to consider the question on the ground that it had not been raised with sufficient specificity to satisfy the requirements of the protest statute, 47 USC 309(c). The Court of Appeals reversed and directed the Commission to determine whether respondent's conduct, in this respect and others, was contrary to the public interest or otherwise demonstrated respondent's unfitness. (97 US 294, 296-7, 231 F2d 246, 248-50).

> have any property right in the sponsor's programs, and thereby does not in this permission intend to convey any such property right to Station WSAY."[3]

WBBF's refusal to give such consent formed one of the bases of Petitioner's protest [under 47 USC 309(c)] of a grant of renewal of respondent's broadcasting license. (Record pp. 199-200, J. App. 78, par. 15).

The Commission refused a hearing on petitioner's protest. As more fully set forth in Footnote 2, *supra*, petitioner appealed from that denial, and the Court of Appeals reversed. On remand, still without a hearing, the Commission determined (Supp. J. App. 17, Par. 14) that respondent WBBF's refusal to consent to rebroadcast of programs in which it owned no interest was not illegal and did not contravene public policy. It also determined (Supp. J. App. 17-23, Pars. 14-16) that the blanket refusal of consent by respondent WBBF was not contrary to the public interest, and did not demonstrate unfitness on respondent's part to continue as a licensee. The Commission identified six criteria by which the reasonableness of a slave or network station's refusal to consent to rebroadcast of program materials in which it owns no interest could be determined, and in these words:—

> "[D]eterminations as to whether refusals are justified or unjustified will depend upon the facts of particular cases, and upon an evaluation of such factors as
>
> '[1] whether licensees of stations . . . act in concert with each other or with other interests in refusing rebroadcast requests,
>
> '[2] whether requesting stations serve the same or a different area as the station whose program they wish to rebroadcast,
>
> '[3] whether the request is for permission to carry a simultaneous rebroadcast or to rebroadcast a program at some subsequent date,

[3] Record p. 206, J. App. 85.

> '[4] whether the requesting station has indicated a willingness to pay a reasonable share of the legitimate costs of the originating station,
>
> '[5] whether or not other persons having interests in the program have requested or agreed to the rebroadcast, and
>
> '[6] whether the program concerned has public service aspects that make its wide disseminating to the public clearly desirable'."[4]

Petitioner appealed. The Court of Appeals affirmed. This petition followed.

In the opinion from whence this petition comes, the Court of Appeals disposed of the question now presented to this Court in the following language:—

> "Concerning [petitioner's] request for rebroadcasting privileges, the Commission determined that [petitioner] had sought essentially blanket authorization to rebroadcast all programs carried by WBBF in which WBBF may have no proprietary interest. It concluded, *inter alia*, that WBBF was justified in refusing to grant such authorization absent (1) more specificity as to the programs [petitioner] sought to rebroadcast, the time they would be rebroadcast and the financial provisions to be made for such rebroadcast privileges or (2) a showing that WBBF acted in concert with another station, or other interests in refusing the request.
>
> "We think the Commission's action in rejecting this ground of the protest was correct because the request for rebroadcast authority was patently unreasonable in scope." (App. 27, *infra*).

And, at this juncture, the Court of Appeals appended its footnote 6, which reads thus:—

> "We do not reach the question of the validity of the Commission's interpretation of the rebroadcast provisions of § 325(a) of the Communications Act, as

[4] Supp. J. App. 20-21; numerals in brackets added.

"expressed in the 1952 rule making proceedings to amend the rebroadcasting rules. *See Report on Amendment of the Rebroadcasting Rules*, 1 PIKE AND FISCHER RADIO REG. (Pet. 3) 91:1131 and 1136."

It is to be observed that the Commission did not rule that petitioner's request was "unreasonable", and neither the Commission nor the respondent WBBF advanced that contention in the Court of Appeals.

JURISDICTION OF THE COURT BELOW

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction of petitioner's appeal under the provisions of 47 USC § 402(b)(6).

REASONS URGED FOR GRANTING THE WRIT

This petition presents a question of nation-wide concern and interest. It presents an issue which directly affects every radio listener and TV viewer[5] in the United States, and which is of concern to every commercial licensee, all networks, all advertising agencies that deal with broadcasting accounts, and the sponsors of all broadcast programs. The question itself is encased in the rebroadcast provision of the Radio Act of 1927 [now cited as 47 USC 325(a)] which this Court has never construed, and which the Court of Appeals refused to interpret.

As construed by the Commission—and the Commission is content to concede that the meaning it reads into the

[5] In a TV case now pending in the Court of Appeals (FEDERAL BROADCASTING SYSTEM, INC. v FEDERAL COMMUNICATIONS COMMISSION, Appellee, and WHEC-TV, and WVET-TV, Intervenors, Appeal No. 15,505) the same rebroadcast policy is again involved. In view of the recency of the ruling from which this petition comes, the petitioner will do no more in Appeal No. 15,505 than to note the pendency of this petition so as to save that question in that appeal pending final disposition of the issue by this Court.

statute is not that which Congress intended[6]—the utilization of millions of dollars worth of outstanding radio broadcast material, the rebroadcasting of which would be in the public interest, can be (and is) kept from the public because a licensee which is *not* "the originating station", but which is a mere slave or network station (the networks themselves being uncontrolled by the Commission) has authority, under the Commission's regulations, to refuse its consent to the rebroadcast of materials in which it owns no interest, and to thereby make rebroadcast of such program illegal even if the owner wants it to be rebroadcast.

The Court of Appeals failed to decide a properly presented and necessary question of substance relating to the construction and application of a statute of the United States [47 USC 325(a)] which has not been, but should be, settled by this Court. Thus, the Court of Appeals expressly predicated its decision upon the sole ground that petitioner's request "was patently unreasonable in scope"; and, in footnote 6 of its opinion, the Court pointed out that it did not reach the validity of the Commission's interpretation of Section 325(a).

Just as negligence does not exist in thin air, so too is reasonableness a relational concept. Thus, before there can be any real question as to whether a request for permission to rebroadcast is reasonable in scope, it must appear that the request is directed to, and considered by, the real party in interest. And it is precisely at this point, and on this point, that the statute and the Commission part company. The statute requires "the express authority of the originating station" and it requires nothing more. However, the Commission requires "the consent of the station whose radio signals are received . . . even in those situations where property rights

[6] See, pp. 19/20 of "Brief for Appellee" filed in the Court of Appeals in Appeal No. 14,418, the proceedings from which this petition comes.

in the program may rest elsewhere."[7] The decisional paragraph in the ruling of the Commission that is directly involved in this petition (paragraph 15, Supp. J. App. 19-21) was expressly predicated upon this construction of Section 325(a).

As is at once evident, the expression "the station whose radio signals are received" is much broader than "the originating station", for the former includes slave or network affiliates which own no interest in the program. The fact of the difference above noted at once raises the question of whether the Commission has construed the statute correctly. If it has not done so, it is pointless for any court to be concerned with the possible niceties of the permissible scope of a request for rebroadcast permission. Such an inquiry would be important only if made to, and considered by, the entity whose express authority is required by the statute; and, there will be ample time for the Commission and or the Court of Appeals to adjudicate on the reasonableness of such a request if and when stations desiring to make rebroadcasts are permitted to direct their requests of the real party of interest for final authorization as contemplated by Section 325(a). The prime question, therefore, is not whether petitioner's request was reasonable, but is instead whether a slave or affiliate station is invested by Section 325(a) with effective power to deny rebroadcast requests.

The question on which the Court of Appeals did rule is one this Court has not settled, namely, whether it is "patently unreasonable" to ask a slave or network station for blanket consent to rebroadcast programs in which it owns no interest when the slave station is told that before the material is rebroadcast, the express authority of the owner or originating station will be obtained.

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[7] Supp. J. App. 20—for full text of the Commission's "Report and Order", see Record pp. 142-147, J. App. 37, 43.

Since the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction of appeals from the Federal Communications Commission, the fact that there is no conflict with another Circuit is immaterial.

The Court of Appeals determined that petitioner's request for rebroadcast consent was properly refused because it "was patently unreasonable in scope." Petitioner respectfully urges that that opinion is as untenable as it is unfathomable.

First, it should be noted that the refusal (Record p. 217, J. App. 96) was just as broad in scope as the request. Further, respondent never at any time suggested that it would give its consent to rebroadcasts if petitioner would limit the times within which it rebroadcast, list the exact programs or types of programs as to which rebroadcasts were contemplated, nor did WBBF ever indicate the financial terms or arrangements it would require.[8] As the Court of Appeals stated in its first opinion relating to rebroadcast rights, 97 US App DC at 296, 231 F2d at 249:—

> "* * *. The new owners of WBBF . . . nowhere showed any inclination to grant *any* rebroadcast privileges to [petitioner]. * * *. (Emphasis supplied)

[8] After respondent had intimated in one of their refusals that financial negotiations might settle the matter, the petitioner, in at least one of its requests (December 30, 1952) stated:—

> "* * *. I am most anxious to determine what you feel you are entitled to, to allow us to rebroadcast sponsors' programs. *I am willing to immediately negotiate with you for any remuneration which you feel you should receive for the services which you would afford us and for which you are not already paid by the sponsors of these programs.* I await your reply." (App. 35-36, emphasis supplied)

However, since respondent never intended to give any consent anyhow, nothing came from the above offer.

Again, in that first opinion, the Court said:—

> "* * *. We do not understand that the Commission has passed on the substantive issues here involved: at least it has not done so with clarity. True, it advised [petitioner] by letter in an earlier proceeding that WBBF's refusal to allow re-broadcast privileges did not contravene the Commission's rules or the Communications Act. * * *. But lack of actual violation of law or regulation is not decisive: the question is whether the alleged conduct is contrary to the public interest, or otherwise demonstrates unfitness of the licensee. * * *. The Commission should approach the matter in that light. Only if it is clear from the face of the protest, taking all the protestant's allegations as true, that there is no real merit in protestant's position or substantial possibility that a hearing will reveal merit, should the protest be rejected without a hearing." 97 US App DC at 297, 231 F2d at 250.

But, on the second appeal, the Court (as hereinbefore noted) concluded that petitioner's request "was patently unreasonable in scope."

Precisely the same request was before the Court of Appeals in both cases. If, as that Court now says, petitioner's request was "patently unreasonable", it could have said so the first time. Certainly, if petitioner's request really was "patently unreasonable", the Court of Appeals subjected all parties to the expense of a useless proceeding when, as it did in its first re-broadcast decision, it remanded on the precise question of the propriety of the refusals.

Again, the fact that petitioner did not allege that respondent WBBF's blanket refusal of rebroadcast consent was determined upon in concert with another station or other interests, is immaterial. Joint action could make the impropriety worse, but an otherwise unjustified or improper act is not to be deemed proper or in the public interest merely because done single handedly.[9]

[9] None of the anti-trust statutes were invoked by petitioner.

Thirdly, neither the Commission or the Court of Appeals have chosen to suggest how WBBF's refusal to consent to rebroadcast could be less than contrary to the public interest, since the consent it withheld was that of a slave or network station which owned no interest in the program, and its refusal prevented the public from hearing rebroadcasts of programs that WBBF, certainly, could not say were not good.

The deeper question (i.e., more basic than the Commission's possible opinion on public interest) is whether it is arbitrary and capricious for the Commission to invest a slave or network affiliated station with the power to prevent a rebroadcast by requiring the slave station's consent even when it owns no interest in the broadcast material and, when, in fact, it has been paid in full for (and made a profit from) the initial broadcast. In the Commission's own words "Section 325(a) [has now been] interpreted as providing that no program may be rebroadcast without the consent of the station whose radio signals are received . . . . even in those situations where the property rights in the program material may rest elsewhere." And, the Commission then went on to confess that as interpreted by it, "Section 325(a) may no longer accurately reflect present conditions [e.g., network broadcasting and sponsor-ownership of program material] or effectively carry out the original intent of Congress." (Supp. J. App. 20/21).

The only requirement in Section 325(a) for lawful rebroadcast is "the express authority of the originating station." Clearly, one first step in working out an interpretation of Section 325(a) is to ascertain the meaning of the term "originating station", and to thus identify the interest Section 325(a) seeks to protect. But, even though light on the legislative intent was made available to both the Commission and the Court of Appeals, the former has produced a rule which, contrary to the public

interest, insures an absolute minimum of rebroadcasting, while the Court of Appeals simply declined to construe the statute.

The legislative history[10] of the phrase "the express authorization of the originating station" is straightforward, uncomplex, clear, and convincing—and further, it makes good sense. Thus, Senator Dill, the father of Section 28 [now Section 325(a)] said:—

> "Mr. Dill. * * *. As to section 28, providing that no person, firm, or corporation shall rebroadcast the material broadcast by a station without that station's consent, it is, I think, a very necessary provision. Otherwise we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under the modern methods of rebroadcasting it could be picked up and broadcast from other stations, and particularly over the wired wireless, and money charged for listening to it. The provision referred to does not prevent rebroadcasting, but it does require those who would rebroadcast to get permission from the original broadcaster. * * *" (Congressional Record, p. 2880, 3 February 1927).

After Senator Dill gave the Senate the above quoted explanation, the Conference Report was adopted, and the precise language that is today cited as 47 USC 325(a) soon thereafter became law.

The Court of Appeals was in error when, as stated in Footnote 6 to the opinion in the present case, it declined to consider "the validity of the Commission's interpretation of the rebroadcast provisions of § 325(a)." In the proceedings adverted to by the Court of Appeals in that footnote, the Commission determined that refusals to allow rebroadcast must not be unreasonable (for pertinent text, see quotation on page 8, *supra*), but its deci-

[10] Congressional Record, pp. 2869-2882, especially at p. 2880, 3 February 1927.

sion was predicated on the unwarranted assumption which plainly contradicts the legislative history of Sec. 325(a) that the assent of a station that owned no interest in the program to be rebroadcast could be required merely because it was that particular station's signal that was received. The statute itself contemplates rebroadcasts when "express authority of the originating station" is obtained. Section 325(a) does not contemplate multiple requests, nor the consent of parties that have no actual legal interest. Section 325(a) does not try to cripple or hamstring rebroadcasts. The Commission is not at liberty to require the consent of a slave station especially when the slave station *cannot* authorize, even if it would, the rebroadcast rights sought. Congress clearly intended, and Section 325(a) clearly gives, radio stations protection against rebroadcasting of *their* programs only when they are the "originating station", i.e., a station that owns an interest in the broadcast material.

The following example illustrates the error (and inappropriateness) of the Commission's construction of Section 325(a). WXYZ in New York City, the owner and originator of the program known as "Old Favorites", leases WBBF's time each week, Wednesday from 10 to 10:30 p.m., so that "Old Favorites" can be heard in Rochester, New York. WBBF is paid *in full* for carrying the program, and it has no power to authorize anyone to rebroadcast it. WBBF has about the same interest in "Old Favorites" as Western Union has in a telegram—and, actually, has as much lawful right to restrain its circulation. But, if WSAY wants to rebroadcast "Old Favorites", WSAY must obtain WBBF's consent! Why? Because the Commission says so. Certainly the Act does not. WSAY is entirely ready to ask WXYZ for *its* "express authority" [which is all Section 325(a) requires], but since the paid-for signal of WBBF is the source through which WSAY receives the program material, the

Commission insists that WBBF's rebroadcast consent is indispensable.

Even if it may properly be assumed that a station in the status of respondent WBBF, Inc., has (under the Act) any right to refuse to consent [11] to rebroadcast of programs in which it owns no interest, an important question remains for this Court's decision: Is it proper for a broadcast licensee to withhold rebroadcast consent as to programs in which it owns no interest merely because the request for such consent is a blanket request? The Commission says yes, and in these words: "Moreover, we are of the view to hold that Section 325(a) encompasses blanket requests for rebroadcast privileges would be seriously inconsistent with our previous interpretations of that section." (Supp. J. App. 20).

The Court of Appeals (which had no previous interpretations vulnerable to reconsideration), without purporting to construe the Act, held that petitioner's request was "patently unreasonable." But, neither the Commission nor the Court of Appeals explain why they take the view they do. And, while both have thus limited rebroadcast requests to a program-by-program basis, the Act itself does not. Where an applicant for blanket consent so conditions and limits the terms of its request as to identify by class or nature a group of programs as to which rebroadcast consent is desired, the question may well arise as to whether the limitations are reasonable, i.e., whether the grouping is such that there are no diverse considerations which might reasonably argue for consent as to some of the grouped programs, but negatively as to some others in the group. But, the mere

[11] Probably not even the respondent would contend that it has the right to authorize rebroadcasts as to programs of the sort that interest the petitioner, because petitioner is *not* interested in rebroadcasting any program originated by WBBF.

fact that wholesale consent is desired does not *ipso facto* justify a wholesale refusal.[12]

In the instant case, petitioner carefully limited its request, and sought WBBF's permission only as to programs in which WBBF did "not have any property right" and as even further clarification, petitioner's request made it clear that WBBF was not being asked to consent to the rebroadcast of "sustaining programs, the talent or subscription cost of which is paid for, by [WBBF], or a network furnishing the program material * * *." (Record p. 216, J. Supp. 95). Indeed, a licensee that in good faith wanted to stand aside from preventing rebroadcasts that might be in the public interest when it had not legitimate right to control rebroadcast thereof, would be delighted with the sort of request petitioner made of WBBF *because* the consent WBBF might so easily have given required petitioner to proceed at its own peril. Merely to say the request is "blanket" does not dispose of the reasonableness of the request, nor does it justify a refusal.

It is respectfully submitted that the six criteria that the Commission says shall govern in determining whether the refusal to authorize a rebroadcast is unreasonable[13] have no relation to the facts of economic life in the broadcast industry (if one looks at interests *other* than

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[12] It may be observed that as a convenience to the uncontrolled (but powerful) networks, the Commission *permits* blanket requests and blanket consents; see "Note" to the Commission's regulation 3.121(b) and 3.121(e) quoted on page 5, *supra*.

[13] "The Commission has said: 'A refusal either by a network affiliate, or a non-network station, to permit a rebroadcast where based upon no reasons at all, or upon unreasonable grounds may well constitute conduct going to the qualifications of a licensee to operate in the public interest.' F.C.C. Report and Order, May 14, 1952. In the Matter of Amendment of Sections 3.191, et. al., Docket No. 9808." Footnote 3 to the first rebroadcast opinion of the Court of Appeals, 97 US App DC at 297, 231 F2d at 250.

the interests of the networks) and clearly ignore the public interest. Briefly, and in the same sequence advanced by the Commission (see text on page — *supra*), the defects in those six criteria are as follows:—

1. Re, the criteria of refusals in concert. This ignores the improper refusal by a single station—nowhere even alluded to by the Commission.

2. The question of whether the rebroadcaster serves the same area as the initial broadcaster would matter only if there were a simultaneous rebroadcast—and no one is seriously even thinking about simultaneous rebroadcasts in radio. In television, the case is otherwise.

3. When will the rebroadcast be made? If it is a slave or network station that owns no interest in the program, this factor is immaterial to it; but, the value to a rebroadcaster is to rebroadcast the program at a later date and at a different hour of the day to reach a different audience. The normal rules of economics will take care of any imaginary horribles the Commission might have been dreaming of here.

4. In its fourth criterion, by some curious means, a plural is developed—where Section 325(a) speaks only of "*the* originating station", the Commission speaks of "the originating stations", i.e., "whether the requesting station has indicated a willingness to pay a reasonable share of the legitimate costs of the originating stations [sic]." Truly that criterion is an invitation to the waltz of endless bickering—"reasonable shares"—"legitimate costs"—etc. But more to the point is the simple fact, of which this Court will doubtless take judicial notice, that the slave or network station has *no net costs* in carrying a network program: instead, it receives a profit for that time.

5. By its reference to "other persons having interests in the program" the Commission evidently segregates the

slave or network station from the sponsor-owner of the program. This Court's attention is invited to the evident fact that according to the Commission, the consent of the slave or network station is indispensible to a rebroadcast even if the full owner of that material wants to have it rebroadcast. Thus, the Commission, in its fifth criterion says that it is important to know "whether or not other persons having interests in the program have requested [of the slave or network station] or agreed [with the petitioner for consent] to the rebroadcast." In short, the Commission seems to be creating a wholly new kind of property right.[14]

Sponsor-owners of high quality programs who must compete for the favor of the networks so as to obtain the choicest hour for the presentation of their programs—both radio and TV—cannot risk the displeasure of the networks by taking the initiative in seeking rebroadcasting arrangements. Only when the law permits the real party in interest to give final and effective consent to rebroadcast requests will the public get the benefits that rebroadcasting can give. But, under the policy declared by the Commission, there can be (and in fact is) no appreciable amount of rebroadcasting. The policy the Commission has devised works to the great advantage of the networks in that they are encouraged in their cut-throat competition of scheduling the best programs they have at hours when opposing networks offer their best—each thereby forcing the public to make a final choice. Such a practice is clearly contrary to the public interest, for once the public has made its choice, it never gets to hear or see the other programs. On the other hand if rebroadcasting were encouraged (or, if

[14] It will be remembered that petitioner's request of WBBF contemplated the authorization of "other persons"—thus (see Record, p. 87) petitioner's request was limited to "programs of a sponsor or sponsors which desire, or may desire their programs rebroadcast by [petitioner]."

the Commission's policy were one which even made rebroadcasting possible) as was originally contemplated by Section 325(a), the networks' policy of cut-throat competition would be ameliorated at least to the extent of limiting its effect to the primary or initial broadcast occasion since the public would have an opportunity, at later dates, at different hours, to see or hear one or the other of the programs as to which the public would otherwise have had to have made a final choice. The policy of giving the public a chance to make a choice at its own convenience is exactly what the networks do not want, and it is exactly what the Commission's policy does not allow.

6. The sixth criterion is confusing. Read in one way, it suggests that if the program material does not have "public service" characteristics, consent to its rebroadcast can be rejected arbitrarily. If read as saying that when there are public service aspects that make wide dissemination of the program desirable the slave or network station should be sure to grant its consent, it is equally improper. This criterion so clearly violates 47 USC 326—the prohibition against censorship—that discussion is not necessary. But, it may be noted that this criterion evidently appealed strongly to the Commission since it said (see Supp. J. App. 22) "Nor does [petitioner's] request for rebroadcast privileges indicate whether the program concerned has public service aspects that make its wide dissemination clearly desirable."

47 USC, Sec. 402(b) gives to the United States Court of Appeals for the District of Columbia Circuit exclusive jurisdiction over appeals from the Federal Communications Commission. In light of this Court's decision in FEDERAL COMMUNICATIONS COMMISSION v WJR (1948) 337 US 265, 285, which holds that when the Court of Appeals has not decided upon the basic issue of law on the merits, the case should be remanded to that Court

for decision of such question, since the Court of Appeals did not rule on the basic issue of law in the instant case, petitioner will not urge that the initial judicial construction of Section 325(a) be made by this Court at this time. Accordingly, petitioner suggests that this Court grant certiorari and remand to the Court of Appeals with directions to determine whether the term "originating station" in the statute is properly interpreted by the Commission to include a slave or network station that does not own any part of the program to be rebroadcast; or, in other words, whether a station seeking rebroadcast authority must obtain the consent of the station whose signal it receives when that station has been paid in full for the use of its facilities and owns no interest in the material disseminated by its signal.

The importance of the criteria by which requests for rebroadcasting privileges may be refused is, to the public and the radio industry (which still includes independent broadcasters) obvious. Petitioner urged in the Court of Appeals that those followed by the Commission were untenable. But, neither that Court nor any other has assayed those precepts which are of such vital importance. This Court should ascertain whether they are valid, or, in the alternative, should direct the Court of Appeals to do so, as indicated in FEDERAL COMMUNICATIONS COMMISSION v WJR, *supra*.

CONCLUSION

The questions here presented can fairly be said to be of such importance as to call for this Court's action. The writ should issue, and this Court resolve the questions themselves or, in the alternative, remand to the Court of Appeals with instruction to determine same.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1958.

No. 14,418

FEDERAL BROADCASTING SYSTEM, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WBBF, INC., INTERVENOR

Filed: April 2, 1959
Joseph W. Stewart, Clerk

Appeal from Decision and Order of the Federal Communications Commission.

Before: BAZELON, WASHINGTON and BASTIAN, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision and order of the Federal Communications Commission on appeal in this case are affirmed.

Per Curiam.

Dated: April 2, 1959.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14418

FEDERAL BROADCASTING SYSTEM, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WBBF, INC., INTERVENOR

Appeal from a Decision of the Federal Communications Commission

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Decided April 2, 1959

Mr. Charles F. O'Neall for appellant.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, for appellee. *Messrs. John L. Fitzgerald*, General Counsel, Federal Communications Commission, *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, at the time the brief was filed, and *Mark E. Fields*, Counsel, Federal Communications Commission, were on the brief for appellee.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, was on the brief for intervenor.

Before BAZELON, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: This controversy involves a protest, under § 309(*c*) of the Federal Communications Act,[1] by appel-

[1] The protest was filed under the provisions of § 309(c), as existent prior to amendment in 1956. Added by ch. 879, 66 STAT. 715 (1952). See text at note 3 *infra*.

iant, a radio station licensee, against the renewal of the broadcasting license of its competitor, radio station WBBF. The protest, as summarized in our opinion in an earlier appeal in this controversy,[2] charged:

> (1) that WBBF was chargeable with "arbitrary refusal to grant consent pursuant to Section 325 (a) of the [Communications] Act . . . for Station WSAY to rebroadcast sponsors' programs", and (2) that WBBF had put in effect an arrangement whereby advertisers who patronized both WBBF and another radio broadcasting station under common control with it and partly overlapping its service area would receive a 25% discount from the usual rates, constituting unfair competition and causing Federal Broadcasting a loss of some $16,000 in advertising accounts.

The Commission dismissed "for failure to specify with particularity facts, matters, and things relied upon which warrant the designation of the WBBF application for hearing under Section 309(c) of the Communications Act." On the earlier appeal, we held the dismissal erroneous and remanded the case to the Commission for further proceedings. We noted, however, that since argument of the appeal before this court, § 309(c) had been amended to permit the Commission to treat a protest as if on demurrer.[3] We expressly reserved opinion on the applicability of the revised procedure to this case on remand.

On remand, the Commission invoked the "demurrer" procedure: It heard oral argument on whether the facts alleged in the protest constitute sufficient grounds for setting aside WBBF's license renewal, and concluded that

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[2] *Federal Broadcasting System* v. *Federal Communications Comm'n*, 97 U.S.App.D.C. 293, 295, 231 F.2d 246, 248 (1956).

[3] As amended, 70 STAT. 3 (1956), 47 U.S.C. § 309(c) (Supp. V, 1958).

they did not.[4] Accordingly it affirmed its grant of license renewal to WBBF. The present appeal followed.

At the outset appellant complains that the Commission erred in applying the demurrer procedure of § 309(c), as amended. We think not. *Federal Braodcasting System* v. *Federal Communications Comm'n*, 99 U.S.App.D.C. 320, 239 F.2d 941 (1956).[5]

Concerning appellant's request for rebroadcasting privileges, the Commission determined that appellant had sought essentially blanket authorization to rebroadcast all programs carried by WBBF in which WBBF may have no proprietary interest. It concluded, *inter alia*, that WBBF was justified in refusing to grant such authorization absent (1) more specificity as to the programs Federal sought to rebroadcast, the time they would be rebroadcast, and the financial provisions to be made for such rebroadcast privileges or (2) a showing that WBBF acted in concert with another station, or other interests in refusing the request.

We think the commission's action in rejecting this ground of the protest was correct because the request for rebroadcast authority was patently unreasonable in scope.[6]

As to appellant's objections to the discount WBBF and its associate station allowed to advertisers purchasing

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[4] The oral argument was interrupted by a mock air raid alert, and, by agreement of the parties and the Commission, the remainder of the argument was conducted by written brief.

[5] That appeal, although prosecuted by appellant in the suit now before us, arose out of a matter entirely unrelated to the instant proceedings.

[6] We do not reach the question of the validity of the Commission's interpretation of the rebroadcast provisions of § 325(a) of the Communications Act, as expressed in the 1952 rule making proceedings to amend the rebroadcast rules. See *Report on Amendment of the Rebroadcasting Rules*, 1 PIKE & FISCHER RADIO REG. (Pt. 3) 91:1131 and 1136.

time on both stations, the Commission noted that discounts allowed for such joint advertising are not *per se* unreasonable. It also noted that there is considerable overlap in service area between WBBF and its associated and mutually owned station, and that appellant does not assert either that the stations require advertisers to advertise on both stations, or that Federal's monetary loss resulting from the joint advertising practice would in any way impair Federal's ability to broadcast in the public interest. It thereupon concluded that the joint advertising practice was not contrary to the public interest, and in no way demonstrated the unfitness of WBBF to hold its license. In these circumstances, we cannot say that the Commission erred in failing to disapprove of the joint advertising discounts.

Nor do we find merit in the other objections raised by appellant.

Affirmed.